

IN THE SUPREME COURT OF MISSOURI

Case No. SC 88367

CYNTHIA CARPENTER, *et al.*
Plaintiffs/Respondents

v.

COUNTRYWIDE HOME LOANS, INC.
Defendant/Appellant

**On Appeal from the Circuit Court of St. Louis County,
Hon. Gary M. Gaertner, Jr., Circuit Judge**

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES..... 3

INTRODUCTION 5

REPLY TO “STANDARD OF REVIEW” 7

REPLY TO “FACTUAL RESPONSE” 9

 Fee Practices 9

 Fannie Mae And Freddie Mac 10

 Non-Lawyer Involvement 10

 Expert Witness John Holstein 11

 Definition Of The Fee 12

ARGUMENT..... 14

I. NUMEROUS FACTORS MUST BE CONSIDERED IN THE ANALYSIS
OF WHETHER ONE IS ENGAGING IN THE LAW BUSINESS; THOSE
FACTORS, PROPERLY WEIGHED, REQUIRED JUDGMENT FOR
COUNTRYWIDE 14

 A. The Charging Of A Fee Alone Does Not Convert Permissible
 Conduct Into The Unauthorized Practice Of Law..... 14

 1. The Multi-Factored Test In *Hulse* Is Still Our Law 14

 2. The Legal Issue In This Case Has Not Already Been Decided.. 17

B.	The <i>Hulse</i> And <i>First Escrow</i> Factors Required Judgment For Countrywide	19
C.	The Law Business Statute Requires A Representative Relationship In Order To Find The Law Business Being Practiced	21
D.	Plaintiffs’ Policy Arguments Turn The Purpose Of The Unauthorized Practice Rules On Its Head.....	23
II.	THE TREBLE DAMAGES PROVISION OF THE LAW BUSINESS STATUTE IS UNCONSTITUTIONAL	25
III.	THE TRIAL COURT’S JUDGMENT ERRONEOUSLY AWARDED DAMAGES FOR INJURIES OCCURRING OUTSIDE OF THE LAW BUSINESS STATUTE’S TWO-YEAR LIMITATION PERIOD	26
A.	Countrywide Properly Raised, Preserved And Asserted Its Point That The Judgment Was Excessive As A Matter Of Law.....	26
B.	Section 484.020 Clearly Provides A Two-Year Limit On The Time For Private Recovery Under The Law Business Statute	27
C.	Section 516.420 Does Not Apply In This Action	29
IV.	THE TRIAL COURT’S IMPOSITION OF PREJUDGMENT INTEREST WAS IMPROPER	30
	CONCLUSION	31

TABLE OF AUTHORITIES

CASES

<i>Bordon v. Div. of Employment Sec.</i> , 199 S.W.3d 206 (Mo. App. 2006).....	21
<i>Bray v. Brooks</i> , 41 S.W.3d 7 (Mo. App. 2001)	17, 26
<i>Burnett v. Griffith</i> , 769 S.W.2d 780 (Mo. banc 1989)	26
<i>Charter One Mortgage Corp. v. Condra</i> , 865 N.E.2d 602 (Ind. 2007)	18
<i>District Cablevision L.P. v. Bassin</i> , 828 S.W.2d 714 (D.C. App. 2003)	26
<i>Div. of Labor Standards, Dep’t of Labor and Indus. Relations v. Walton Constr. Mgmt. Co.</i> ,	
984 S.W.2d 152 (Mo. App. 1998).....	30
<i>Eisel v. Midwest Bankcentre</i> , No. ED87582 (Nov. 28, 2006).....	14, 15
<i>In re First Escrow</i> , 840 S.W.2d 839 (Mo. banc 1992).....	<i>passim</i>
<i>In re Goldschmidt</i> , 2006 WL 3780732 (Mo. App. Dec. 26, 2006)	29
<i>Hinnah v. Director of Revenue</i> , 77 S.W.3d 616 (Mo. banc 2002)	8
<i>Hulse v. Criger</i> , 247 S.W.2d 855 (Mo. banc 1982)	<i>passim</i>
<i>Lester v. Sayles</i> , 850 S.W.2d 858 (Mo. banc 1993)	25
<i>Murphy v. Carron</i> , 536 S.W.2d 30 (Mo. banc 1976).....	7
<i>Sansone v. Sansone</i> , 586 S.W.2d 87 (Mo. App. 1979)	30
<i>Schwartz v. Bann-Cor Mortgage</i> , 197 S.W.3d 168 (Mo. App. 2006).....	29, 30
<i>Smith v. City of St. Charles</i> , 552 S.W.2d 60 (Mo. App. 1997)	22
<i>Smith v. Kansas City Southern Railroad Co.</i> ,	

87 S.W.3d 266 (Mo. App. 2002).....	22
<i>State ex. rel. Griffin v. R.L. Persons Constr., Inc.,</i>	
193 S.W.3d 424 (Mo. App. 2006).....	28
<i>In re Thompson, 574 S.W.2d 365 (Mo. banc 1978)</i>	17, 18
<i>Thompson by Thompson v. Crawford, 833 S.W.2d 868 (Mo. banc 1992)</i>	27
<i>Vogel v. A.G. Edwards & Sons, Inc., 801 S.W.2d 746 (Mo. App. 1990)</i>	31
<i>Williams v. Rorer, 7 Mo. 556 (1842)</i>	30

STATUTES & RULES

R.S.Mo. § 407.010 <i>et seq.</i> (“MPA”).....	27, 29
R.S.Mo. § 408.020.....	31
R.S.Mo. § 408.040.....	31
R.S.Mo. § 484.010.....	<i>passim</i>
R.S.Mo. § 484.020.....	<i>passim</i>
R.S.Mo. § 484.025.....	23
R.S.Mo. § 516.420.....	27, 29, 30
Mo. Sup. Ct. R. 5.30.....	22
Mo. Sup. Ct. R. 73.01	8, 9

OTHER

Supreme Court Advisory Committee Formal Opinion No. 6	22
Supreme Court Advisory Committee Formal Opinion No. 38	22
Missouri Bar Advisory Committee Informal Opinion 46	22

INTRODUCTION

Plaintiffs’ entire argument on the unauthorized practice of law issues can largely be summed up in one sentence: “The charging of a fee, *standing alone*, is enough to convert innocent *pro se* activity by a party to a transaction into the unauthorized practice of law or unlawful law business.” Plaintiffs’ Brief (“Pl. Br.”) at 53. Plaintiffs’ argument completely disregards the analytical framework this Court provided over 50 years ago in *Hulse v. Criger*, which explicitly requires the weighing of multiple factors, only one of which is the presence of a fee:

We think the guiding principle must be whether under the circumstances the preparation of the papers involved is the business being carried on or whether this really is ancillary to and an essential part of another business. The simplicity or complexity of the forms, the nature and customs of the main business involved, the convenience to the public, and whether or not separate charges are made, all have a bearing upon the determination of this question.

247 S.W.2d 855, 862 (Mo. banc 1982) (emphasis added). Plaintiffs’ single-factor analysis simply cannot be reconciled with this Court’s direction, underlined above, that “all [factors] have a bearing upon the determination of this question.” *Id.* Nor, in light of the language of *Hulse* and *In re First Escrow*, 840 S.W.2d 839 (Mo. banc 1992), should

this Court accept Plaintiffs' lengthy and speculative argument that there really is no multi-factored test at all. Pl. Br. at 52-55.

Plaintiffs apparently understand, however, that they need to do more to avoid *Hulse's* dictate and to overcome Countrywide's uncontroverted trial evidence, including the expert testimony of Judge Holstein, as to the multiple factors of the test. Plaintiffs ask the Court to ignore the uncontroverted evidence because, they contend, this Court already has ruled that "a non-lawyer" that charges a separate fee in connection with document preparation automatically violates the law. *E.g.*, Pl. Br. at 40-45, 52-54, 60.

There is no such holding in this Court's cases. As Plaintiffs accurately quote it, *Hulse* held only that a *real estate broker* may not make a separate charge for documents and *First Escrow* held only that an *escrow company* may not make a separate charge for documents. Pl. Br. at 41-42, *quoting Hulse*, 247 S.W.2d at 862; Pl. Br. at 44, *quoting First Escrow*, 840 S.W.2d at 849. Each case was no more than a direct application of the *Hulse* multi-factored analysis, where "all" factors "have a bearing" to the specific facts. Neither *Hulse* nor *First Escrow* held anything about non-lawyers or real estate transactions generally.

This case presents a question not yet decided by this Court – does a *lender* commit the unauthorized doing of the law business under the facts as proven at trial.

Countrywide's evidentiary showing was compelling that each of the factors identified in the cases, except the charging of the fee, weighs in favor of a finding that its conduct was legal and appropriate. Even the existence of a fee does not weigh against Countrywide

because the preparation of documents plainly is ancillary to Countrywide’s business of lending money, the shifting of loan fees to borrowers in consumer loan transactions is common, and there was no evidence that Countrywide charged the fees so that it could conduct a separate “document preparation” business. While their decisions are not controlling on this Court, all of the state Supreme Courts in the last 20 years that have addressed whether a mortgage lender charging fees for document preparation is engaged in the unauthorized practice of law – including those in Michigan, Illinois and Indiana – have concluded the lender is not. After weighing “all” the factors and the evidence, so should this Court.

Plaintiffs offer no convincing reasons why the Circuit Court did not err as to the other points on appeal. This Court should consider the constitutionality of R.S.Mo. § 484.010’s mandatory treble damages rule and find such a rule to be a violation of due process because the trial court punished Countrywide without evidence of a culpable mental state. As to damages issues, the Court should not accept Plaintiffs’ rather creative attempts to excuse the trial court’s error in awarding over \$1.6 million in damages for a five year period under a statute which, on its face, only allows claims to be brought within two years. The Court should also vacate the prejudgment interest award of nearly \$1 million because Plaintiffs cannot point to a statutory authorization for it.

REPLY TO “STANDARD OF REVIEW”

The parties agree that review of the trial court’s judgment in this case is governed by *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). Countrywide established in

its Opening Brief (“Opening Br.”) at 15-28, 43, that every relevant fact to the liability determination was not disputed, so the issues on appeal are only legal ones, which the Court must review *de novo*. *Hinnah v. Director of Revenue*, 77 S.W.3d 616, 620 (Mo. banc 2002).

Plaintiffs respond that because Countrywide did not request findings of fact under Rule 73.01(c), “all of the fact issues in this case should be considered to have been found in favor of Plaintiffs and against Countrywide.” Pl. Br. at 16. This argument fails.

Rule 73.01 provides that a party may ask the Court to include “findings on the controverted fact issues,” and, without findings, those facts are found against the party. The Rule does not contemplate or require that the trial court be asked to make findings on uncontroverted facts. The Rule only addresses findings as to *controverted* facts, and, therefore, it cannot require *uncontroverted* facts to be decided against the moving party.

Rule 73.01 makes no sense if applied as Plaintiffs propose because it would be an empty formality to require findings where the material trial evidence was uncontested. Plaintiffs’ imagined rule also would unduly burden the trial judges of this state, who doubtless would be deluged with requests for findings in precisely the cases – those with an undisputed record – where expeditious and efficient decisions should be encouraged.

Plaintiffs’ attempts to distinguish Countrywide’s authorities as to the standard of review (*see* Pl. Br. at 17-19) are not persuasive. Regardless of how Plaintiffs characterize them, each stands for the proposition that the Rule does not require that *uncontroverted* facts be found against the appellant. Tellingly, Plaintiffs do not cite a single case where

uncontroverted trial evidence was found to be untrue, by operation of Rule 73.01. This is not surprising, as neither the law nor logic require such a result.

Plaintiffs also make unsupported statements about their own offering of “substantial evidence supporting the judgment,” and argue that Countrywide’s proof was merely “immaterial evidence” which Plaintiffs chose not to rebut. Pl. Br. at 20. The assertions ought to be disregarded. Plaintiffs do not explain with any particularity what their “substantial evidence” was, and do not identify any controverted facts. Plaintiffs’ contention that they chose not to rebut Countrywide’s evidence only establishes that the facts Countrywide offered were undisputed.

Plaintiffs’ entire case rested on an uncontested assertion, that Countrywide charged a document preparation fee, and they essentially chose not to contest any other facts that were offered at trial. *De novo* review is appropriate.

REPLY TO “FACTUAL RESPONSE”

Plaintiffs’ “factual response” is, for the most part, neither factual nor a response. Each “fact” Plaintiffs attempt to show is either (1) not a fact, or (2) not actually in dispute, or (3) has nothing whatsoever to do with the issues on appeal.

Fee Practices.

Plaintiffs contend that Countrywide did not charge a document preparation fee on every loan it made, that not every branch charged a fee, and that whether the fee was charged was largely based on competitive considerations or particular issues related to a

specific loan – such as a customer accommodation. Pl. Br. at 21-24. Countrywide never claimed otherwise. None of these issues are relevant to the issues on appeal.

Fannie Mae And Freddie Mac.

Plaintiffs point out that Fannie Mae and Freddie Mac do not require lenders to charge document preparation fees. Pl. Br. at 25-26. Countrywide has never contended otherwise. The point of Countrywide’s evidence about Fannie Mae and Freddie Mac, none of which was disputed, was that: (1) Fannie Mae and Freddie Mac require lenders to use their form instruments (Opening Br. at 18-19, 56-57); (2) the form documents are used throughout Missouri (Opening Br. at 20); and (3) a private practice Missouri lawyer retained by Fannie Mae and Freddie Mac, John McNearney, drafted the language of the form Note and Deed of Trust in each of Plaintiffs’ transactions (Opening Br. at 20, 54). Plaintiffs do not and cannot dispute that the substance of the legal instruments at issue in this case were drafted or approved by a Missouri lawyer. They nowhere explain why it matters that neither company requires document preparation fees be charged.

Non-Lawyer Involvement.

Plaintiffs erroneously claim that non-lawyer Countrywide employees “prepare” undefined, non-legal documents or “select the legal documents” used for each transaction. Pl. Br. at 25, 27. The first of these points, even if true, is irrelevant. The preparation of non-legal documents is not at issue in this unauthorized practice of law case.

As to selection of legal documents for a transaction, Plaintiffs incompletely cite to testimony from a Countrywide employee describing the process by which a non-lawyer “funder” chooses documents from a list for an individual transaction. Pl. Br. at 27, *citing* Tr. 423-24. Plaintiffs omit, however, the next 20 lines of testimony, which explained that only *one note* and *one deed of trust* are presented for the non-lawyer to pick. Tr. 424-25.¹

Countrywide’s in-house attorneys decided which Note and which Deed of Trust correspond to each particular transaction type. Opening Br. at 22. No legal discretion whatsoever is being exercised by non-lawyers in Missouri as to the legal documents involved.

Expert Witness John Holstein.

Plaintiffs next shoehorn into their “Factual Response” the observation that they “timely objected” to the expert testimony by former Supreme Court Judge John Holstein. Pl. Br. at 28. Countrywide agrees the objection was timely, but the trial court allowed the testimony over objection. Plaintiffs do not argue that its admission was error, other than by a throwaway sentence, without citation, that the testimony was “not admissible.” *Id.*

Moreover, Plaintiffs misrepresent to this Court the type of testimony Countrywide offered from Judge Holstein at trial. Plaintiffs contend that Countrywide “relies heavily in this appeal on Judge Holstein’s . . . analysis of the statutory language,” but this is not

¹ The only exception is that a so-called “balloon” note does appear, but no Plaintiff had a note with that feature and there was no evidence that any class member had such a loan.

true. The testimony Judge Holstein gave on direct examination was that, based on a careful analysis of the uncontested factual evidence, and considering the various factors that go into an unauthorized practice analysis, the record did not support a finding that unauthorized law practice had occurred. Opening Br. at 52-64. The only questions posed to Judge Holstein at the trial regarding the “statutory language” were those posed by Plaintiffs or the Court (Tr. 462-70), and, although Countrywide agrees with Judge Holstein’s legal analysis, that is not the expert testimony that Countrywide offered and was admitted in support of the defense.

Definition Of The Fee.

Finally, Plaintiffs devote seven pages of their brief to launching an *ad hominen* attack on Countrywide and its trial counsel concerning an alleged “definition” of the document preparation fee about which Plaintiffs contend Countrywide made “false representations.” Pl. Br. at 29-35. This is all irrelevant to the appeal. The dispute over Countrywide’s “definition” of document preparation fee concerned whether the fee was charged for all of the documents prepared or only for some of them. It is a damages issue. The trial court did not allocate damages by apportioning the fee among legal and non-legal documents, and that decision has not been made a point of error for this appeal.

Plaintiffs recognize this in their brief. Pl. Br. at 30, n.1. Therefore, the argument has no place in this appeal.²

Countrywide is constrained to point out that, in any event, it made no misrepresentation. The idea that Countrywide hid from Plaintiffs a statement on a publicly-available website is unfounded. The suggestion that trial counsel misled the Circuit Court is wrong. Counsel's statements that there was no evidence of "written documentation" was consistent with the testimony that fees are set in local branch offices, not dictated from the company's headquarters (Tr. 324-26) and that there was no written definition by the branches as to which documents the fee was charged for. LF 566.

² Plaintiffs fail to inform this Court that, following the trial and before entry of judgment, Plaintiffs brought a motion for sanctions and punitive damages based on these same allegations, now repeated in their appellate brief. LF 61. That motion was denied by the trial court, and was not made the subject of a cross-appeal. *Id.* So the attack is not only irrelevant, it has been rejected previously.

ARGUMENT

I. NUMEROUS FACTORS MUST BE CONSIDERED IN THE ANALYSIS OF WHETHER ONE IS ENGAGING IN THE LAW BUSINESS; THOSE FACTORS, PROPERLY WEIGHED, REQUIRED JUDGMENT FOR COUNTRYWIDE.

A. The Charging Of A Fee Alone Does Not Convert Permissible Conduct Into The Unauthorized Practice of Law.

1. The Multi-Factored Test In *Hulse* Is Still Our Law.

Countrywide established in its Opening Brief that the charging of a fee alone is not dispositive of the unauthorized practice determination. This conclusion is required by *Hulse* and *First Escrow*, which created and applied a multi-factor test, in which “all” factors “have a bearing upon the determination” of the unauthorized practice issue. *Hulse*, 247 S.W.2d at 862.³ Plaintiffs disagree and argue, consistent with the Court of Appeals’ decision in *Eisel*, that charging a fee alone creates an unauthorized law practice. Pl. Br. at 53; Tr. 22; *Eisel* at 7 (charging a fee “obviates the need to review the nature of,

³ It is this Court, and not the General Assembly, that defines what is the practice of law. Opening Br. at 45-46, citing *Hulse*, 247 S.W.2d at 85 and *First Escrow*, 840 S.W.2d at 843 n.7 (General Assembly “may only *assist* the judiciary by providing penalties for the unauthorized practice of law, the ultimate definition of which is always within the province of this Court”) (emphasis in original).

or context in which the loan documentation was prepared”). The trial court here expressly followed *Eisel*, thus implicitly ruling that the charging of a fee is dispositive.

Countrywide respectfully submits that Plaintiffs, the trial court and *Eisel* are wrong. It is plain that this Court in *Hulse* and *First Escrow* articulated a very clear but general test for courts to apply in making an unauthorized practice determination. The “guiding principle” in determining whether someone has engaged in the law business “must be whether under the circumstances the preparation of the papers involved is the business being carried on or whether this really is ancillary to and an essential part of another business.” *Hulse*, 247 S.W.2d at 862. The Court in *Hulse* then identified four specific factors to review in order to make that determination: (1) the simplicity or complexity of the forms; (2) the nature and customs of the main business involved; (3) the convenience to the public, and (4) whether a separate charge was made. *Id.* It added a fifth factor in *First Escrow*, whether the defendant had a “direct financial interest in the transaction.” 840 S.W.2d at 847. Neither *Hulse* nor *First Escrow* concludes that any one factor in this general test is dispositive. Indeed, *Hulse* expressly states that “all” factors “have a bearing” on whether the activity is ancillary to another business, and thus whether the doing of the law business has occurred. 247 S.W.2d at 862.

Plaintiffs ignore the clear articulation of a legal test, from *Hulse* and *First Escrow*, and even claim that those cases do not require a multi-factor analysis at all. Pl. Br. at 52-55. The contention is remarkable, for the words on the pages of the case books are unmistakable. To repudiate both the ancillary test and the *Hulse* and *First Escrow*

factors, Plaintiffs invent the convention that this Court's factors are merely examples of "different roads by which a non-lawyer can go astray and engage in the unauthorized practice of law." Pl. Br. at 54. Given that the Court in *Hulse* and *First Escrow* analyzed the law both inside and outside Missouri in detail, and then expressly created a detailed framework under which to analyze law business claims, it strains reason to suggest that the analytical framework the Court articulated is nothing more than examples of "different roads" by which one might "go astray."

Even if the factors are nothing more than "different roads" to the unauthorized practice of law, their inclusion in the case law (whether labeled factors or "roads") means that they must be considered. *Hulse* says that that "all" factors "have a bearing" on the issue, and *First Escrow* approved and expanded upon the analytical framework of *Hulse*. If Plaintiffs' so-called "roads" lead toward some destination – some determination of unauthorized practice – then "all" must be considered and analyzed as part of that inquiry. There is no reason for the Court to develop an analytical framework and then, fifty years later, abandon it in favor of only one factor.

Here, Plaintiffs' repeated invocation of the importance of *stare decisis* is ironic. Pl. Br. at 62, 66. *Hulse* has stood for more than a half century, providing guidance to the bar and to non-lawyers as to how unauthorized practice issues will be decided. The ancillary test cannot and should not be abandoned or marginalized.

2. The Legal Issue In This Case Has Not Already Been Decided.

Plaintiffs' alternate argument is that this Court has already weighed the factors and decided the issue presented by this appeal. Plaintiffs claim that *Hulse* and *First Escrow* held that “non-lawyers’ who charge a separate fee for the completion of these standard-form documents are improperly engaged in the law business” – always, no matter what. Pl. Br. at 40-41. This is neither the holding of *Hulse* nor the holding of *First Escrow*. The Court did ultimately reach holdings in those cases, but those holdings related to third-party brokers and escrow companies only. See *Bray v. Brooks*, 41 S.W.3d 7, 12 (Mo. App. 2001) (*Hulse* was limited to its specific facts by *In re Thompson*, 574 S.W.2d 365, 367 (Mo. banc 1978)). In deciding *Hulse* and *First Escrow*, the Court applied the very multi-factor ancillary test that Plaintiffs now say does not exist. The holdings from *Hulse* and *First Escrow* thus reflect the Court’s *application* of that test to the real estate brokerages and escrow companies before it. Neither case announced rules for mortgage lenders, which are parties to their loans, or for all non-lawyers generally.

To bolster their argument that this case has been decided, Plaintiffs offer a strained reading of footnotes 7 and 10 in *First Escrow*. In Footnote 7, the *First Escrow* Court observed that “[b]oth *Hulse* and our opinion today bar service providers from charging a fee for preparing legal documents ...” Plaintiffs then claim that “the [*First Escrow*] Court defined “[s]ervice providers as including ‘brokers, title companies and lenders,’” in footnote 10 of that opinion. Pl. Br. at 44 (emphasis in Pl. Br.). But footnote 10 is nothing more than a survey of what courts in other states had decided as to various

unauthorized practice claims; it is not a holding of the case as to Missouri law. And, of course, a lender is not a service provider in a loan transaction – it is the central party – so footnote 7 is inapplicable here.

If Plaintiffs really believe this Court’s decision should be guided by out-of-state law, Countrywide would gladly agree. There is precedent for that approach. In *Hulse, First Escrow* and prior unauthorized practice cases, this Court has surveyed other states’ case law, particularly where another jurisdiction had decisions “directly on point” when Missouri did not. *Thompson*, 574 S.W.2d at 367 (relying on foreign cases addressing sale of divorce kits). Such is the case here. This Court has never addressed lender document preparation, but its multi-factor analytical framework is consistent with the decisions from every state Supreme Court in the last twenty years that has decided that issue. Each of these cases considered numerous factors, concluded that the charging of a fee alone cannot be dispositive, and held that lender document preparation fees do not amount to the unauthorized practice of law. Opening Br. at 61.

Earlier this month, the Indiana Supreme Court became the latest high court to rule that lenders are not engaged in the unauthorized practice of law by charging a document preparation fee. *Charter One Mortgage Corp. v. Condra*, 865 N.E.2d 602, 607 (Ind. 2007) (“there is no unauthorized practice of law when form mortgage documents are prepared by non-attorneys. We also agree that the mere charging of a fee does not transform permissible conduct into the unauthorized practice of law”). Plaintiffs preemptively address the Indiana Supreme Court decision, which was issued after

Countrywide’s Opening Brief, only by referring to it as flawed and “remarkably shallow.” Pl. Br. at 72-73. Plaintiffs would prefer that the Court look to a variety of older cases from other states, none of which reflect the modern view from sister Supreme Courts that rejected virtually identical unauthorized practice claims.⁴

If charging a fee is dispositive, then the test articulated in *Hulse*, as modified by *First Escrow*, is entirely superfluous: whether the forms are simple, the nature and customs of the main business, the convenience to the public, and whether a party has a financial interest in the transaction are each irrelevant. This Court should not accept Plaintiffs’ invitation to write the ancillary test out of Missouri law.

B. The *Hulse* and *First Escrow* Factors Required Judgment For Countrywide.

The undisputed facts on four of the five *Hulse/First Escrow* factors favored a conclusion that Countrywide’s document preparation activity is ancillary to its main business of lending and therefore cannot be the unauthorized doing of the law business. Opening Br. at 50-65. Judge Holstein’s lengthy and careful analysis of the application of undisputed facts to the various factors this Court identified as “having a bearing” on the

⁴ Plaintiffs’ older cases (*see* Pl. Br. at 74-76), mostly from the 1930s, 40s and 50s do not help them, as each lists a laundry list of factors in determining whether a defendant is engaged in the practice of law – *none* concludes that a fee is dispositive. And each case Plaintiffs cite involved a broker, real estate agent or other third party, not a lender.

issues makes this clear. *Id.* Countrywide will not repeat that discussion here, but on this appellate record it is now uncontested that (1) the legal instruments at issue are simple forms drafted by a Missouri attorney on which Countrywide inserts objective information such as name, address, interest rate and the like – in the words of Judge Holstein they are “standard form documents” (Tr. 449; Opening Br. at 53-56); (2) the nature and custom of the lending business is to prepare and use these standardized forms (Opening Br. at 56-57); (3) the use and preparation of standard instruments benefits the public (Opening Br. at 58-59); and (4) Countrywide has a direct financial interest in its transaction with each member of the class – it is the lender on each transaction. Opening Br. at 63-65.

That a document preparation fee was charged does not even weigh against Countrywide under the facts of this case. The presence (or absence) of a fee is only useful in applying the test to the extent the fee indicates that the underlying activity – here, loan document preparation – is the “main business being carried on,” rather than ancillary to another business. There was no evidence Countrywide provides “document preparation services” for anyone, it is just documenting its own loans. Tr. 255, 448. Plaintiffs offered no evidence that Countrywide’s document preparation is a separate business or is the “economic driver,” to use their formulation. The record reflects that the fee covers Countrywide’s costs involved in preparing documents. Tr. 324. Moreover, as the trial court recognized in questioning Judge Holstein, document preparation costs are an expense that lenders will recoup, whether through another fee or through the interest

rate. Tr. 454. The fee does not and should not dictate the outcome of the ancillary test, for, under the facts, the fee does not show that a separate business is being conducted.

In opposition, Plaintiffs completely ignore Countrywide's evidence and its legal analysis of the *Hulse* and *First Escrow* factors – conceding, as they must, that all factors other than the charging of a fee favored judgment for Countrywide. Whatever arguments Plaintiffs might have made, but chose not to, should not now be considered. *Bordon v. Div. of Employment Sec.*, 199 S.W.3d 206, 209 n.2 (Mo. App. 2006).

C. The Law Business Statute Requires A Representative Relationship In Order To Find The Law Business Being Practiced.

Both the language of § 484.010 and the formal Advisory Committee Opinions establish that for Countrywide to have engaged in the law business, it must have acted in a representative capacity vis-à-vis the Plaintiffs. Opening Br. at 69-71.

Plaintiffs' attempt to "parse[] out" the statute "to disclose its grammatical structure," and defeat this common sense reading (Pl. Br. at 56-58), is flawed. Plaintiffs' reading of § 484.010 results in the unusual conclusion that every activity that constitutes the law business requires a representative relationship *except* for preparing documents. This is because the first clause of the section, "advising or counseling" another regarding the law, inherently requires a representative relationship, and Plaintiffs concede the third clause, securing property rights, also must occur within a representative relationship. Plaintiffs' reading makes no sense because there is nothing about drawing documents that is so different to suggest that such a distinction was intended, and statutes should not be

construed to lead to illogical results. *Smith v. City of St. Charles*, 552 S.W.2d 60, 62 (Mo. App. 1977).

A more reasonable reading is that the third clause of § 484.010 is a “catchall” provision, which contains a requirement of representation so as to define and limit the clause to the types of conduct that the overall law regulates. The law business is inherently representative – lawyers act for and advise clients. The reference to a “representative capacity” in the catchall clause thus is natural, but does not suggest that the ordinary concept of legal practice involving representation of another is absent from the types of conduct addressed by the rest of the section.

The Formal Advisory Committee opinions confirm that the drafting of mortgages by an employee of a company that is a party to the loan is not law practice. Opening Br. at 69, citing *Supreme Court Advisory Committee Formal Opinion* Nos. 38 & 6. Plaintiffs critique the use of these opinions, but both Formal Opinions were cited favorably by this Court in *First Escrow*. 840 S.W.2d at 846-47 & n.15. Alternatively, Plaintiffs ask the Court to follow *Informal Opinion 46* (*Missouri Bar Bulletin*, Dec. 1980), (Pl. Br. at 47), but informal opinions are not binding. Mo. Sup. Ct. Rule 5.30; *Smith v. The Kansas City Southern Railroad Co.*, 87 S.W.3d 266, 274 (Mo. App. 2002). This informal opinion has never been cited.

In any event, *Informal Opinion 46* supports Countrywide because it rests its conclusion as to whether the law business has occurred on whether the documents are being prepared “*for clients*”, i.e., in a representative relationship. Since Countrywide is

not providing loan documents “for [borrowers]” the opinion is inapposite on the facts, but it nevertheless confirms that unauthorized practice turns on the presence or absence of a representative relationship.⁵

D. Plaintiffs’ Policy Arguments Turn The Purpose Of The Unauthorized Practice Rules On Its Head.

The purpose behind the unauthorized practice rules (“to protect the public from being advised or represented in legal matters by incompetent or unreliable persons,” *Hulse*, 247 S.W.2d at 857-58) is not served by this lawsuit or by the trial court’s judgment. Opening Br. at 65-69. Whether Countrywide fills in the blanks on form documents and whether it charges a fee has no relationship to protecting the public from incompetent legal advice.

Plaintiffs do not respond to this argument, but proffer policy contentions of their own. Pl. Br. at 60-65. Plaintiffs’ arguments fail.

Plaintiffs first argue that a public policy prohibiting lenders from charging document preparation fees makes sense, because charging a fee “suggests that the

⁵ Plaintiffs also argue that the General Assembly’s enactment of § 484.025 was in response to litigation against mortgage lenders to change existing law. Pl. Br. at 49-52 . This speculation is unsupported by legislative history. It is just as likely, if not more so, that the General Assembly regarded these lawsuits as contrary to the intent of § 484.020, and enacted § 484.025 to clarify that intent.

preparation of the documents is itself an economic driver . . . a money-making activity,” and that “[m]issteps in choosing the right legal document can have damaging consequences.” Pl. Br. at 60-61. These assertions are off the point, for the only question here is how this Court should regulate the Law Business. Putting aside the fact that it is illogical to argue that a \$125 fee is the “economic driver” in a \$150,000 loan, making such fees illegal does not protect borrowers from unlicensed lawyers. Similarly, in addition to the fact there was no evidence whatsoever of any mistakes in the documents memorializing Countrywide’s transactions with class members, the fee does not cause mistakes, which could happen with or without fees or with or without lawyers.

Off the point even further, Plaintiffs suggest that Countrywide’s computer system “selects” documents and Countrywide is “misleading the public” by charging a document preparation fee “for work performed by a computer.” Pl. Br. at 63-64. Plaintiffs also argue that consumers like them would have expected some lawyer to review the documents. Pl. Br. at 64. Again, these points do not support the contention that document preparation fees constitute the unauthorized practice of law, and they are unsupported on this record. It was uncontroverted that the substance of the legal instruments at issue were drafted by attorneys and that the computer system is programmed at the direction of attorneys. No plaintiff testified he or she expected lawyers to prepare the documents, or computers not to be involved. In fact, Cheryl Held had her own lawyer, but sued Countrywide for the unauthorized practice of law anyway. Opening Br. at 25 & n.5.

II. THE TREBLE DAMAGES PROVISION OF THE LAW BUSINESS STATUTE IS UNCONSTITUTIONAL.

Countrywide has shown that the Law Business Statute is unconstitutional to the extent it imposes punitive treble damages without a culpable mental state. Opening Br. at 75-78. In opposition, Plaintiffs first argue that Countrywide did not properly raise its constitutional issue “at the first opportunity.” Pl. Br. at 78. The constitutional issue is a legal one that only concerns damages, and so the fact it was raised about two months prior to trial does not make it untimely. LF 60. Plaintiffs also do not claim to be prejudiced by the timing of the challenge. *See, e.g., Lester v. Sayles*, 850 S.W.2d 858, 869-70 (Mo. banc 1993) (amendment of legal affirmative defense at pretrial conference would not prejudice Plaintiff). The point is properly before the Court.

Plaintiffs defend this statute by citing other statutes imposing double or treble damages in other instances, and Missouri cases which they believe show instances where treble damages were imposed without a culpable mental state. Pl. Br. at 85. But none of the cases cited have addressed Countrywide’s constitutional challenge, and so are no answer to it. The three Texas cases that Plaintiffs cite as rejecting constitutional attacks on treble damages laws (Pl. Br. at 89-91) are distinguishable because, in each, the defendant challenged the constitutionality on notice and vagueness grounds, not on the grounds Countrywide raises here – that a treble damages law may not mandate punitive damages without a culpable mental state.

Plaintiffs admit “there is no doubt that the treble damages provided by § 484.020 is a penalty.” Pl. Br. at 106. Due process requires that punishment be preceded by a finding of a culpable mental state. *See, e.g., Burnett v. Griffith*, 769 S.W.2d 780, 787 (Mo. banc 1989); *District Cablevision L.P. v. Bassin*, 828 A.2d 714, 726-27 (D.C. App. 2003). As Plaintiffs concede, they did not prove that Countrywide acted with a culpable mental state, so § 484.020 was unconstitutionally applied in this case and the treble damages award was error.⁶

III. THE TRIAL COURT’S JUDGMENT ERRONEOUSLY AWARDED DAMAGES FOR INJURIES OCCURRING OUTSIDE OF THE LAW BUSINESS STATUTE’S TWO-YEAR LIMITATION PERIOD.

A. Countrywide Properly Raised, Preserved And Asserted Its Point That The Judgment Was Excessive As A Matter Of Law.

Plaintiffs contend that Countrywide did not properly “raise, preserve and assert” its challenge to a judgment awarding over \$1.6 million in excessive damages for a five year period under a statute that on its face provides that claims must be brought within

⁶ Plaintiffs’ response to Countrywide’s argument that the voluntary payment doctrine bars Plaintiffs’ claims is unpersuasive. Pl. Br. at 94-97. No statutory exception applies to eliminate the defense, and the Law Business Statute is silent on this issue. *Bray*, 41 S.W.3d at 13, on which Plaintiffs rely, does not even address the voluntary payment doctrine, and is not dispositive of this issue of first impression in this Court.

two years. The argument is frivolous. In closing, Countrywide argued (and hence raised) the point that if the Court were to find in Countrywide's favor on the Merchandising Practices Act ("MPA") claim (which it did), damages would be limited to the two year period in the Law Business Statute. Tr. 607-10. Countrywide timely preserved its objection to the Judgment post-trial. LF 372-76. And it properly asserted the issue in its Opening Brief, expressly identifying the only "judgment" in this case in Point Four. Opening Br. at 82.

B. Section 484.020 Clearly Provides A Two-Year Limit On The Time For Private Recovery Under The Law Business Statute.

Countrywide established in its Opening Brief that the plain language of the Law Business Statute confirms that a private party must bring a claim within two years of the date the party paid the money at issue, or a civil suit is barred. *See* § 484.020.2 (person injured may sue for amounts paid "within two years from the date [monies] shall have been paid"). This is exactly what the trial court decided years ago in dismissing all Law Business claims that arose two years prior to the filing of the Petition. LF 94. Thus, there should have been no award of damages under the Law Business Statute for borrowers whose loans closed more than two years before suit was filed.

There is no need for this Court to accept Plaintiffs' invitation to look outside the Law Business Statute for a different, longer limitations period. General statutes of limitations, such as § 516.420 which Plaintiffs cite, will not be "injected into a cause of action that has its own built-in statute of limitations." *Thompson by Thompson v.*

Crawford, 833 S.W.2d 868, 871 (Mo. banc 1992); *see also State ex. rel. Griffin v. R.L. Persons Constr., Inc.*, 193 S.W.3d 424, 429 (Mo. App. 2006) (specific statute governs rather than general).

Plaintiffs argue that such a search outside the Law Business Statute is appropriate because § 484.020's limitations period "is not a statute of limitations," but this argument does not help them. Section 484.020.2 imposes a two-year deadline by which members of the Class were required to bring claims. The trial court treated this limitation as a standing requirement, LF 94, but whether the two-year rule is considered one of limitations or of standing is immaterial to the outcome of this appeal. The General Assembly's two-year window clearly bars recovery for any class member who did not sue within the two-year window.

Plaintiffs' counsel admitted in closing argument that all Law Business Statute damages are time-limited as Countrywide contends: "[T]here is a two-year standing period for a private party to bring an action under the Unauthorized Practice of Law Statute." Tr. 621. Plaintiffs' attempt to explain away this straightforward admission is bizarre and unpersuasive. They contend counsel did not admit to a general two-year recovery period, because the trial court already "had ruled that Plaintiffs were only entitled to single damages outside of the two year standing period" and so the quoted statement really addressed only the treble damages part of the Law Business case. Pl. Br. at 110. The court had made no such ruling, and Plaintiffs cite none. Moreover, the admission came immediately after Countrywide asserted, in closing argument, that the

Law Business claim must be limited to a two-year time period, an argument Plaintiffs *did not refute*. Tr. 607-10, 619-22.

Perhaps of greater moment, the five year recovery was inappropriate because Plaintiffs never sought single damages on the Law Business claim for the entire class period. *Compare* Pl. Br. at 111 (contending otherwise, without citation). Instead, Plaintiffs pursued a five-year damages window only under the unsuccessful MPA theory, as their own record citations show. *See* LF 315-16; Trial Exs. 13 & 19.

Nothing in the Law Business Statute suggests that the two-year period only restricts the availability of treble damages but that single damages can be awarded for a longer period. It should go without saying that the Court may not infer a separate cause of action for single damages from the Law Business Statute itself. *See In re Goldschmidt*, 2006 WL 3780732, at *7 (Mo. App. Dec. 26, 2006) (“express mention of one or more things implies the exclusion of others”).

C. Section 516.420 Does Not Apply In This Action.

Plaintiffs’ alternative argument that the six year limitations period in § 516.420 controls recovery under the Law Business Statute is without basis. Even if Plaintiffs did not waive the point below (Opening Br. at 87-88), § 516.420, as construed in *Schwartz v. Bann-Cor Mortgage*, 197 S.W.3d 168, 178 (Mo. App. 2006), cannot support the Judgment.

Schwartz applied § 516.420 only because the statute at issue there did not have a built-in standing or limitations period, unlike the Law Business Statute, and so is of no

help to Plaintiffs. Moreover, while Plaintiffs contend that there is “no doubt” that Countrywide is a “moneyed corporation” covered by § 516.420 (Pl. Br. at 105), they introduced no evidence whatsoever at trial that Countrywide fits that definition. *See Div. of Labor Standards, Dep’t of Labor and Indus. Relations v. Walton Constr. Mgmt. Co.*, 984 S.W.2d 152, 156 (Mo. App. 1998); Opening Br. at 95.

Finally, as noted in the Opening Brief, § 516.420 does not apply to Countrywide, and *Schwartz*’ broad interpretation attempting to rewrite that law was erroneous.

Opening Br. at 95. Plaintiffs do not explain how *Schwartz* could be correct, given that the case conflicts with this Court’s authority, as well as authority within the Eastern District. Opening Br. at 95-96, discussing *Sansone v. Sansone*, 586 S.W.2d 87, 89-90 (Mo. App. 1979); *Williams v. Rorer*, 7 Mo. 556 (1842) (mortgages are not pledges).

Simply because Countrywide made mortgage loans does not make Countrywide a “moneyed corporation” under § 516.420. This Court should reject any contrary result suggested by *Schwartz*.

IV. THE TRIAL COURT’S IMPOSITION OF PREJUDGMENT INTEREST WAS IMPROPER.

As Countrywide pointed out in its Opening Brief, and Plaintiffs do not refute, prejudgment interest can only be awarded if a statute or a contract affirmatively authorizes it. Opening Br. at 97. Countrywide established that there is no contract or statute on which Plaintiffs could have been awarded prejudgment interest. Opening Br. at 97-102. Plaintiffs offer only two grounds to save that portion of the Judgment, §

408.020 and *Vogel v. A.G. Edwards & Sons, Inc.*, 801 S.W.2d 746 (Mo. App. 1990), but neither provide the basis for the nearly \$1 million interest award. Pl. Br. at 112-115.

Section 408.020 is inapposite, because it governs the award of prejudgment interest on “written contracts,” “accounts” or concerning money “recovered for the use of another,” or involving a “promise to pay interest.” This case is an action on a statute, not any of the above, and Plaintiffs do not allege otherwise.

Vogel does not provide a basis for the award, for case law cannot establish a right of interest. To the extent *Vogel* is based on a statute, the *Vogel* court relied on § 408.020, the contract prejudgment interest statute disposed of above. *See* 801 S.W.2d at 757. The *Vogel* court likely should have applied the tort prejudgment interest statute, § 408.040, as the theory of recovery there was tort, but the case against Countrywide did not sound in tort either.

Having no basis, the trial court erred in awarding Plaintiffs prejudgment interest.

CONCLUSION

For the reasons stated, the Judgment should be reversed in its entirety. In the alternative, the Court should vacate the award of damages that are trebled, vacate the

award of damages to class members whose loans closed earlier than two years prior to suit, and vacate the prejudgment interest award.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of May, 2007, two (2) copies of the Reply Brief of Appellant, along with one (1) diskette containing a copy of the same, were hand delivered to:

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RULE 84.06(c) CERTIFICATION

I certify to the best of my knowledge, information and belief, that this brief:

1. Includes the information required by Rule 55.03;
2. Complies with the limitations contained in Rule 84.06(b);
3. Contains 7,454 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and
4. That the disk has been scanned for viruses and that it is virus free.

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